Supreme Court, U.S.
FILED

(1) 931567 APR 5 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

A.J. INDUSTRIES, INC.,

Petitioner,

v.

DEANE and RAYLENE HEDGES, and
WESTERN AUTO SUPPLY CO., INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

PIETRO J. LYNN, Esq.
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, Vermont 05402-0988
(802) 864-5751

Counsel of Record
of Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

46 pp

QUESTION PRESENTED

I. Whether a trial court may properly exercise personal jurisdiction over a nonresident defendant where the nondefendant's only possible contact with the forum state is the sale of an allegedly defective product to a national distributor?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

OPINIONS BELOW..... 2

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 2

ARGUMENT..... 6

A. THE UNITED STATES SUPREME COURT SHOULD GRANT A.J.'S PETITION FOR CERTIORARI AND RULE THAT A FORUM STATE CANNOT CONSTITUTIONALLY EXERCISE PERSONAL JURISDICTION OVER A NONRESIDENT DEFENDENT WHERE ITS ONLY POSSIBLE CONTACT WITH THE FORUM STATE IS THE SALE OF AN ALLEGEDLY DEFECTIVE PRODUCT TO A NATIONAL DISTRIBUTOR .. 6

1. THIS COURT SHOULD AFFIRM ITS DECISION IN *ASAHI* AND CLARIFY UNDER WHAT CIRCUMSTANCES ADEQUATE "MINIMUM CONTACTS" EXIST TO SUPPORT THE EXERCISE OF SPECIFIC PERSONAL JURISDICTION OVER A NONRESIDENT MANUFACTURER..... 8

2. THE SUPREME COURT SHOULD GRANT A.J.'S PETITION IN ORDER TO CLARIFY WHEN THE EXERCISE OF SPECIFIC PERSONAL JURISDICTION OFFENDS TRADITIONAL NOTIONS OF SUBSTANTIAL JUSTICE AND FAIR PLAY..... 13

CONCLUSION..... 14

TABLE OF AUTHORITIES

Page

CASES

Arguello v. Industrial Woodworking Mach. Co., 838 P.2d 1120 (Utah 1992) 9

Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102 (1987)..... 10, 11, 12, 13

Boit v. Gar-Tech Prods., Inc., 967 F.2d 671 (1st Cir. 1992)..... 11

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 6, 8, 9, 13

Cox v. Hazelock, Ltd., 411 S.E.2d 640, 105 N.C. App. 52, *cert. den.*, ___ U.S. ___, 113 S.Ct. 78 (1992)..... 9

Charles Gendler & Co. v. Telecom. Equip. Corp., 508 A.2d 1127, 102 N.J. 467 (1986) 10, 11

Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990)..... 12

Hanson v. Denckla, 357 U.S. 235 (1958)..... 9

Helicopteros Nacionales de Columbia S.A. v. Hall, 466 U.S. 408 (1984) 6

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 6

Irving v. Owens-Corning Fiberglass Mach. Co., 864 F.2d 383 (5th Cir. 1989).....9, 11

Larose v. Sponco Mfg., Inc., 712 F.Supp. 455 (D.N.J. 1989)..... 12

Madara v. Hall, 916 F.2d 1510 (7th Cir. 1990)..... 12

TABLE OF AUTHORITIES – Continued

Page

Nguyen v. Rapid Granulator, Inc., No. 89-8307 slip op., 1991 WL 85352 (E.D. Pa. May 15, 1991) 12

Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) 6

Ranno v. Sipa Press, Inc., 987 F.2d 580 (9th Cir. 1993) 8

Raths v. United States of America, 911 F.2d 738, 1990 WL 118916 (9th Cir. 1990) 12

Roman Catholic Diocese of Burlington, Inc. v. Paton Insulators, Inc., 496 A.2d 151, 145 Vt. 510 (1985) 7

Tobin v. Astra Pharmaceutical, Inc., 993 F.2d 528 (6th Cir. 1993) 9

Smith v. Dainichi Kinzoku Kogyo, Ltd., 680 F.Supp. 847 (W.D. Tex. 1988) 12

Worldwide Volkswagen v. Woodson, 444 U.S. 286 (1980) 8, 13

UNITED STATES CONSTITUTION

Amendment XIV 2

VERMONT STATUTES

12 V.S.A. § 855 2

No. _____

In The

Supreme Court of the United States

October Term, 1993

A.J. INDUSTRIES, INC.,

Petitioner,

v.

DEANE and RAYLENE HEDGES, and
WESTERN AUTO SUPPLY CO., INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

A.J. Industries respectfully petitions for a writ of certiorari to review the judgment of the Vermont Supreme Court in this case.

OPINIONS BELOW

The opinion of the Washington Superior Court (App. 4), dated September 18, 1992, is unreported. The Vermont Supreme Court's (App. 1) opinion, dated January 13, 1994, is not yet reported.

JURISDICTION

The opinion of the Vermont Supreme Court was entered on January 13, 1991. *Hedges v. Western Auto Supply Co., Inc.*, No. 92-505 slip op. (Vt., Jan. 13, 1994). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are set forth verbatim in the Appendix:

United States Constitution

United States Constitution, Amendment XIV

Vermont Statutes

12 V.S.A. § 855

STATEMENT OF THE CASE

Plaintiffs, Deane and Raylene Hedges, allege that Mr. Hedges was injured by a defective Wizard space heater in

Montpelier, Vermont on July 27, 1988. Armstrong Products Corporation ("Armstrong"), a West Virginia corporation, manufactured the space heater in 1967 and subsequently sold it to Western Auto Supply Co., Inc. ("Western Auto"), a Missouri corporation. There is no evidence as to whom Western Auto retailed the allegedly defective space heater or as to whether Western Auto sold the Wizard space heater in Vermont. Neither Western Auto nor the Hedges allege that the heater was sold in Vermont.

On October 6, 1969, A.J. Industries, Inc. ("A.J."), a Delaware corporation, with its principal place of business in California, merged with Armstrong. At that time, Armstrong became a manufacturing division of A.J.. Western Auto argues that A.J. is a successor-in-interest to Armstrong.

In 1971, A.J. transferred the Armstrong manufacturing division to Armstrong Products Company, Inc., a Delaware corporation. Armstrong Products Company, Inc. was a financially viable corporation which followed all necessary corporate formalities until 1984, when it wound up its affairs and disposed of its remaining assets.

Neither Armstrong nor A.J. have ever been registered or licensed to do business in the State of Vermont, nor have they ever conducted any business there. In fact, there was no evidence presented below that would indicate that Armstrong or A.J. have ever been present in Vermont or solicited business from Vermont residents. Further, the undisputed evidence below demonstrated that Armstrong designed and manufactured the Wizard space heater specifically for the warm weather markets of

the southern states and that it would have been unusual to sell the Wizard space heater in a northern state like Vermont.

On April 11, 1989, the Hedges filed an action against, among others, Western Auto, for injuries caused by the allegedly defective Wizard heater. On July 1, 1991, Western Auto brought A.J. into the case by filing a third-party complaint against it. The Hedges filed a separate direct action against A.J. on July 22, 1991. On August 2, 1991, A.J. moved to dismiss the third-party complaint for lack of personal jurisdiction. A.J. filed the same motion in response to the Hedges' direct claim on August 9, 1991.

The Court delayed ruling on A.J.'s motion to permit discovery on the question of personal jurisdiction. Western Auto and the Hedges conducted discovery as to A.J. and Armstrong's contacts with Vermont. When Western Auto and the Hedges were satisfied that they had discovered all necessary and relevant evidence, they filed supplemental memoranda of law and evidentiary materials in opposition to A.J.'s motion. On August 4, 1992, the litigants appeared before the Washington County Superior Court in Montpelier, Vermont and orally argued A.J.'s pending Motion to Dismiss in a consolidated hearing.

On September 18, 1992, the Superior Court denied A.J.'s motion on both the direct and third-party claims. The Superior Court erroneously held that where a nonresident defendant manufactures a product and then sells it to an independent national distributor, the courts of the forum state may properly exercise long-arm personal

jurisdiction over the nonresident manufacturer, regardless of whether the product was actually sold by the distributor in the forum state.

A.J. subsequently moved the Superior Court for permission to appeal its ruling. The Court denied the motion on September 18, 1992. A.J. then filed a motion with the Vermont Supreme Court for interlocutory review of the Superior Court's decision. On October 28, 1992, the Vermont Supreme Court granted A.J.'s motion for permission to appeal.

By its decision of January 13, 1994, the Vermont Supreme Court affirmed the Superior Court's ruling. It held that where a nonresident manufacturer sells its product to a national distributor and the product is alleged to have caused injury to a Vermont resident, even where there is no evidence that the distributor sold the allegedly defective product in Vermont, there are adequate contacts with Vermont to support the exercise of personal jurisdiction. Otherwise stated, when Armstrong sold the Wizard space heater to Western Auto, it created sufficient minimum contacts to support the exercise of personal jurisdiction over it in every state where Western Auto conducted business by virtue of the fact that Western Auto was a national distributor. A.J. seeks review of that decision by the United States Supreme Court.

ARGUMENT

A. THE UNITED STATES SUPREME COURT SHOULD GRANT A.J.'S PETITION FOR CERTIORARI AND RULE THAT A FORUM STATE CANNOT CONSTITUTIONALLY EXERCISE PERSONAL JURISDICTION OVER A NONRESIDENT DEFENDANT WHERE ITS ONLY POSSIBLE CONTACT WITH THE FORUM STATE IS THE SALE OF AN ALLEGEDLY DEFECTIVE PRODUCT TO A NATIONAL DISTRIBUTOR.

The United States Supreme Court has created a two-part test to determine whether a trial court may properly exercise personal jurisdiction over a nonresident defendant under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. First, the evidence must show that the nonresident defendant has "minimum contacts" with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Second, even where there are "minimum contacts," due process also requires that the exercise of jurisdiction be consistent with notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). Accordingly, personal jurisdiction is properly exercised only where the nonresident defendant has "minimum contacts" with the forum state *and* it would not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over that defendant.

"Minimum contacts" may be established under principles of general or specific jurisdiction. *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 414, n. 9 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446 (1952). General jurisdiction "minimum contacts"

exist where a nonresident defendant's presence in the forum state is so "substantial and continuous" that it may be treated for the purposes of personal jurisdiction as a resident of that state. *Id.*

Since neither Armstrong nor A.J. have ever been present in Vermont, there is no evidence that they ever shipped goods to the state and there is no other proof of general contacts with Vermont which could properly be characterized as "substantial and continuous," there is no factual basis to support the exercise of general jurisdiction over A.J. in Vermont. Indeed, the Vermont Supreme Court did not find adequate "minimum contacts" on general personal jurisdiction grounds.[1] The Vermont Supreme Court's analysis turned on whether there were "minimum contacts" under specific personal jurisdiction doctrine.

---

[1] Under Vermont law, it is the burden of the party seeking to invoke jurisdiction to make a prima facie showing to support its exercise. *Roman Catholic Diocese of Burlington, Inc. v. Paton Investigators, Inc.*, 145 Vt. 510, 512, 496 A.2d 151, 153 (1985). Accordingly, the Hedges and Western Auto must introduce evidence which supports their claim that the Vermont courts may properly exercise personal jurisdiction over A.J.

1. THIS COURT SHOULD AFFIRM ITS DECISION IN *ASAHI* AND CLARIFY UNDER WHAT CIRCUMSTANCES ADEQUATE "MINIMUM CONTACTS" EXIST TO SUPPORT THE EXERCISE OF SPECIFIC PERSONAL JURISDICTION OVER A NONRESIDENT MANUFACTURER.

This Court has long held that there are sufficient "minimum contacts" to support the exercise of personal jurisdiction over a nonresident defendant where the defendant should reasonably anticipate that he or she could be haled into court in the forum state. *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980). Under specific personal jurisdiction doctrine, this standard is satisfied where the defendant "purposefully directs his or her activities toward residents of the forum state and the litigation that results arises from those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472, *see also Ranno v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993) (The defendant "must perform an act or consummate a transaction within the forum" and "the claim must arise out of or result from the defendant's form-related activities.")

The fact that a nonresident manufacturer should reasonably foresee that its product could enter the forum state and injure a resident of the state does not alone support the exercise of personal jurisdiction. *Worldwide Volkswagen*, at 296. ("[F]orseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.") Otherwise stated, a nonresident defendant manufacturer should reasonably anticipate that it could be haled into court in the forum state in connection with a product liability claim only where it

has purposefully availed itself of the privilege of conducting business there with respect to the product that gave rise to the ensuing litigation. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is the purposeful action of the defendant, rather than the unilateral actions of third parties claiming some relation to the defendant that creates the contact with the forum state that we are searching for."); *Rudzewicz*, at 472 (Personal jurisdiction may be properly exercised "where the defendant has purposefully directed his activities at residents of the forum state and the litigation results from alleged injuries that arise out of or relate to those activities. (citation omitted).")

The Vermont Supreme Court apparently construed the sale of the Wizard space heater to a national distributor, Western Auto, as a purposeful act by A.J. to avail itself of the Vermont market. The Vermont Supreme Court reasoned that where a manufacturer places a product into the stream of commerce by selling it to an acknowledged national distributor, the manufacturer knows that the product could be retailed in any of the 50 states. Accordingly, the sale of the product is a purposeful decision by the manufacturer to market its product in all of the states where the distributor conducts business.

This so-called "stream of commerce" theory of jurisdiction is not without support in the state and federal courts. *See, e.g., Tobin v. Astra Pharmaceutical, Inc.*, 993 F.2d 528, 544 (6th Cir. 1993); *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 386 (5th Cir. 1989); *Arguello v. Industrial Woodworking Machine Co.*, 838 P.2d 1120, 1123 (Utah 1992); *Cox v. Hazelock, Ltd.*, 411 S.E.2d 640, 644, 105 N.C.App. 52, 56, (1992), *cert. den.* ___ U.S. ___, 113 S.Ct. 78

(1992); *Charles Gendler & Co. v. Telecom Equip. Corp.*, 508 A.2d 1127, 1130, 102 N.J. 467, 471 (1986). "Stream of commerce" theory finds "minimum contacts" based on the mere fact that it is foreseeable to a nonresident manufacturer that an independent distributor may bring its product into the forum state.

"Stream of commerce" personal jurisdiction does not, however, comply with the fundamental principles of due process annunciated by this Court. As stated above, a proper "minimum contacts" analysis must focus on the acts of the defendant, not some third party, in determining whether the defendant purposefully availed itself of the forum state's market. Hence, a theory of jurisdiction that relies on the actions and intent of an independent third party, like an independent national distributor, should be found unconstitutional. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987) (O'Conner, J., plurality).

Indeed, the *Asahi* plurality found that a theory of personal jurisdiction that is almost wholly based on the Defendant's awareness that its product could enter the forum state is infirm. *Asahi*, at 112. There, Justice O'Conner explained:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state, for example, designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular

> advice to customers in the forum state or marketing the product through a distributor who has agreed to serve as a sales agent in the forum state. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing that product into the stream of commerce into an act purposefully directed toward the forum state.

Asahi, at 112. Otherwise stated, in order to establish that a nonresident purposefully availed itself of a forum state's market, the evidence must show purposeful conduct of the nonresident defendant directed at or in the forum state.

As seen above, some courts have not regarded the *Asahi* plurality as binding. *See, e.g., Irving*, at 386 ("[T]he splintered view of minimum contacts in *Asahi* provides no clear guidance . . . "). Indeed, the Vermont Supreme Court, at least impliedly, rejected the *Asahi* plurality and instead chose to rely upon *Charles Gendler & Co.*, a pre-*Asahi* decision, in holding that A.J. "purposefully availed itself of Vermont's market by selling its heaters to a well-known national distributorship which did business in Vermont." *Hedges*, at 2.

Other jurisdictions have followed Justice O'Conner's reasoning and have held that the "minimum contacts" standard is satisfied only where the evidence shows that the nonresident defendant's conduct created the contacts with the forum state. *E.g., Boit v. Gar-Tech Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (plaintiffs failed to make prima facie showing sufficient to support the exercise of personal jurisdiction where nonresident manufacturer's

only contact with the forum state was the sale of an allegedly defective product to a mail-order company which did business in the forum state); *Madara v. Hall*, 916 F.2d 1510, 1516-1517 (7th Cir. 1990); *Raths v. United States of America*, 911 F.2d 738, 1990 WL 118916 (9th Cir. 1990); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990); *Nguyen v. Rapid Granulator, Inc.*, slip op., No. 89-8307, 1991 WL 85352 (E.D. Pa. May 15, 1991); *Larose v. Sponco Mfg., Inc.*, 712 F.Supp. 455 (D.N.J. 1989); *Smith v. Dainichi Kinzoku Kogyo Ltd.*, 680 F.Supp. 847, 853 (W.D. Tex. 1988).

The United States Supreme Court should, in granting A.J.'s petition for certiorari, clarify any possible uncertainty as to whether *Asahi* binds the lower courts and rule that the *Asahi* plurality set forth the proper standard on the question of specific personal jurisdiction. If, indeed, due process requires some meaningful connection between the forum state and the nonresident defendant, our courts should not exercise jurisdiction where the only conceivable contact with a forum state is the sale of a product to an independent entity outside of that state. *Boit*, at 683. Such facts only show that it is foreseeable that the product might enter the forum state, not that the manufacturer purposefully availed itself of the forum state's market.

The facts before the Vermont Supreme Court in this matter did not support a finding of "minimum contacts" with Vermont under *Asahi*. A.J. did not sell the allegedly defective Wizard heater in Vermont or to a Vermont resident. A.J. did not ship the heater to Vermont and it did not advertise or provide customer service in Vermont. A.J. merely sold the Wizard space heater to a distributor

which selected where it would retail the product. The fact that the heater found its way into Vermont and allegedly injured a Vermont resident should not, without other contacts, support the exercise of jurisdiction by the Vermont courts over A.J.[2] The Vermont Supreme Court, therefore, erred in holding that A.J. was subject to personal jurisdiction in Vermont.

2. THE SUPREME COURT SHOULD GRANT A.J.'S PETITION IN ORDER TO CLARIFY WHEN THE EXERCISE OF SPECIFIC PERSONAL JURISDICTION OFFENDS TRADITIONAL NOTIONS OF SUBSTANTIAL JUSTICE AND FAIR PLAY.

Where there are "minimum contacts" with a forum state, the courts there must determine whether the exercise of personal jurisdiction would nonetheless offend traditional notions of substantial justice and fair play. *Rudzewicz*, at 477; *Worldwide Volkswagen*, at 292. A trial court should refrain from exercising jurisdiction where, notwithstanding the existence of "minimum contacts," it would be unreasonable and unfair to exercise personal jurisdiction over the nonresident in the forum state. *Asahi*, at 121.

Under the above-standard, the Vermont courts should not exercise jurisdiction over A.J. because the

---

[2] This is particularly true since there has been no showing that the Wizard heater was sold by anyone in Vermont. Under *Worldwide Volkswagen*, the unilateral act of a plaintiff in bringing a product into the forum state does create contacts with the forum state as to a defendant. *Worldwide Volkswagen*, at 297.

connection between A.J. and Vermont is at best slim. It is claimed that A.J.'s predecessor in interest manufactured a product in 1967 that caused injuries in Vermont, a state where neither A.J. nor its predecessor in interest ever did business. There is no evidence that the allegedly defective product was sold in Vermont. Further, none of the defense witnesses or evidence in this action are located in Vermont. In short, even if there are "minimum contacts" with Vermont, they are so slight that to exercise jurisdiction over A.J. in Vermont would violate traditional notions of fair play and substantial justice and would, therefore, be unconstitutional.

The Vermont Supreme Court apparently did not find it unreasonable to exercise personal jurisdiction under such circumstances. Hence, this Court should review and overturn the Vermont Supreme Court's decision.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PIETRO J. LYNN, ESQ.
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, Vermont 05402-0988

April 10, 1994.

APPENDIX

TABLE OF CONTENTS

Page

Entry Order, Vermont Supreme Court, January 13, 1994, affirming Washington Superior Court's Opinion and Order ..... App. 1

Opinion and Order of the Washington Superior Court for the State of Vermont, September 11, 1992, denying Motion to Dismiss for Lack of Personal Jurisdiction ..... App. 4

Entry Order, Vermont Supreme Court, October 28, 1992, granting Motion for Permission to Appeal ..... App. 13

Docket Entry, Washington Superior Court for the State of Vermont, October 5, 1992, denying Motion for Permission to Appeal ..... App. 15

Affidavit of Joseph H. Breuer, dated July 31, 1991 ..... App. 17

Affidavit of Gregory Catrambone, dated August 1, 1991 ..... App. 20

Affidavit of John Haake, dated August 1, 1991 App. 22

United States Constitution, Amendment XIV ... App. 24

12 V.S.A. § 855 ..... App. 26

ENTRY ORDER

SUPREME COURT DOCKET NO. 92-505

DECEMBER TERM, 1993

Deane and Raylene Hedges	)	APPEALED FROM:
v.	)	Washington Superior Court
Western Auto Supply Co., Inc., Petrolane Gas Service, Inc., June S. Warren, and Armstrong Products Co.	)	DOCKET NOS. S221-89 WnC S473-91 WnC
and	)	(Filed Jan. 13, 1994)
Western Auto Supply Co., Inc.	)	
v.	)	
A.J. Industries, Inc.	)	

In the above entitled cause the Clerk will enter:

The sole issue before us in this interlocutory appeal is whether defendant A.J. Industries has sufficient contacts with Vermont to support personal jurisdiction here under the Due Process Clause of the United States Constitution. We affirm the superior court's decision upholding Vermont's jurisdiction.

Armstrong Products, a manufacturer from West Virginia, merged in 1969 with A.J. Industries, a Delaware corporation doing business principally in California. In 1971, Armstrong became a division of A.J. A.J. transferred Armstrong Division to Armstrong Products, a Delaware corporation, which in 1984 went out of business. For

convenience, we refer to Armstrong and A.J. interchangeably.

In 1967, Armstrong manufactured "Wizard" space heaters, one of which was alleged by plaintiffs to have been defective. As a result, plaintiff Deane Hedges was injured when it tipped over, causing an explosion where he was working near Berlin, Vermont, in the summer of 1988. Armstrong sold the space heaters to Western Auto, which, in turn, distributed them nationally, including in Vermont. Although the line of heaters in question was designed primarily for a southern market, there were no geographical restrictions on their distribution. The record does not disclose how Hedges came into possession of the unit injuring him.

Armstrong moved to dismiss for lack of personal jurisdiction on the grounds that it was not actively conducting business in Vermont and was not licensed or registered to do business here. V.R.C.P. 12(b)(2). The superior court denied the motion, and we granted Armstrong permission to appeal.

The law applicable to this appeal is extensively set forth in *Northern Aircraft, Inc. v. Reed*, 154 Vt. 36, 40-44, 572 A.2d 1382, 1385-87 (1990), and need not be repeated here. We agree with the trial court that Armstrong "purposely availed" itself of Vermont's market by selling its heaters to a well-known national distributorship which does business in Vermont.

Armstrong argues that no evidence shows that the heater in question or any of its heaters were sold in Vermont. It may be presumed, however, that once a national distributor markets its products, the market is

national, and includes Vermont. No evidence to the contrary was introduced by Armstrong. *Charles Gendler & Co. v. Telecom Equipment Corp.*, 508 A.2d 1127 (N.J. 1986) (distribution of products nationwide gives rise to reasonable expectation that manufacturer is subject to jurisdiction in every state).

Nor has Armstrong advanced any compelling reason why jurisdiction over it would offend " 'traditional notions of fair play and substantial justice.' " *Northern Aircraft*, 154 Vt. at 41 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))). The weight of the factors relevant to litigating here as opposed to another state (relative burdens on the parties and interests of the forums) decidedly favors Vermont as the more appropriate forum. The accident occurred here.

Affirmed.

BY THE COURT:

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

/s/ John A. Dooley
John A. Dooley,
Associate Justice

/s/ James L. Morse
James L. Morse,
Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson,
Associate Justice

[✓] Publish

[ ] Do Not Publish

STATE OF VERMONT

WASHINGTON COUNTY, ss.

Deane Hedges and
Raylene Hedges,
Plaintiffs,

vs.

Western Auto Supply Co.,
Petrolane Gas Service, Inc.,
June S. Warren, and Armstrong
Products Co., a division of A.J.
Industries Inc., a Delaware
corporation, jointly and severally,
Defendants.

Superior Court

Docket
No. 221-89 WnC

Western Auto Supply Co.,
Third-Party Plaintiff,

vs.

A.J. Industries, Inc., a Delaware
corporation, as survivor of
Armstrong Products Corporation,
Third-Party Defendant.

RULING ON MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

(Filed Sept. 11, 1992)

Defendant A.J. Industries, Inc. ("A.J.") moves the court pursuant to V.R.C.P. 12(b)(2) to dismiss the claims brought against it by plaintiffs Deane and Raylene Hedges and defendant Western Auto Supply, Inc. ("Western") for lack of personal jurisdiction. The matter came before the court on August 4, 1992. Plaintiffs Dean [sic]

and Raylene Hedges were represented by Patrick Biggam, Esq. and Stanley White, Esq., a member of the Michigan Bar. Western Auto Supply Co. was represented by Thomas E. McCormick, Esq. and Lori R. Choiniere, Esq. Armstrong Products Co. was represented by Peter S. Cullen, Esq. and A.J. Industries, Inc. was represented by Pietro J. Lynn, Esq. and James W. Spink, Esq.

OPINION

Deane and Raylene Hedges have brought an action against a number of parties, including A.J. and Western. Plaintiffs assert that they were injured by a defective Wizard space heater allegedly manufactured by A.J., a successor in interest to a company called Armstrong Products Corporation and sold to plaintiffs through Western. A.J. is a Delaware corporation with its principal place of business in California. A.J. claims that it has never been licensed or registered to do business in Vermont, nor has it conducted business within the state. It is A.J.'s position therefore that the court of Vermont lacks personal jurisdiction over it.

V.R.C.P. 12(b)(2) allows a party to challenge personal jurisdiction via a motion to dismiss. In *Roman Catholic Diocese of Burlington v. Paton Insulators, Inc.*, 146 Vt. 294, 296 (1985), our Supreme court held that the trial courts have "considerable procedural leeway" in deciding this type of motion. In this case, the court will decide the motion based on the law and the supporting affidavits and depositions. "If the court chooses to determine the issues on the basis of affidavits alone . . . the plaintiff is

only required to make a prima facie showing of jurisdiction, that is, he need only demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss." (citation omitted). In these circumstances it is proper to make supporting findings of fact. *Id.*

The court finds that Armstrong Products Corporation manufactured the Wizard space heater at issue in 1967. *Deposition of William Chatfield*, dated December 27, 1991 ("Chatfield Dep.") at pp. 22, 49. The space heater was sold to Western, a Delaware corporation engaged in the distribution and sale of consumer goods throughout the United States, including Vermont. Armstrong and Western had a contractual relationship in which Western purchased considerable numbers of space heaters from Armstrong for national distribution. Chatfield Dep. at pp. 17-18. Armstrong also distributed its various products through other nationwide retailers such as Montgomery Ward and Sears Roebuck. *Id.* p. 21. Armstrong merged with A.J. in 1969.

When asked if the Wizard was manufactured for distribution and sale throughout the United States, Mr. Chatfield replied that the heaters were to be sold "wherever they could find a market," although the heater was primarily designed for the South and Southwest and was not particularly suited to northern climates. *Id.* at p. 16. When asked if Armstrong had restricted the sale of its heaters to a particular market, Mr. Chatfield stated that he could not recall any such restrictions. *Id.* at p. 17.

Conclusions of Law

A.J. takes the position that there is no evidence that the allegedly defective space heater was sold in Vermont, and because of the heater's design for warmer climates that it is more likely that the heater was purchased outside the state. A.J. asserts that even if the heater was purchased by plaintiffs via a Vermont outlet of Western, A.J.'s contacts with Vermont are insufficient as a matter of law for Vermont to exercise personal jurisdiction over it.

Vermont's long arm statute reflects a policy to assert jurisdiction over defendants to the full extent permitted by the due process clause. *Northern Aircraft v Reed*, 154 Vt 36, 40 (1990). In order to exercise proper jurisdiction over out-of-state defendants a two-part test must be satisfied. First, the out-of-state defendant must have "minimum contacts" with the forum state. *Id.* at 41. Second, if minimum contacts are found, due process requires that any exercise of jurisdiction be consistent with notions of "fair play and substantial justice." *Burger King v Rudzewicz*, 471 U.S. 462, 474 (1985).

In order to satisfy the minimum contacts requirement, the critical factor is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Northern Aircraft v Reed* at 41, citing *World Wide Volkswagen Corp. v Woodson*, 444 U.S. 286, 297. The standard of reasonable anticipation is fulfilled when it can be shown that the defendant "purposoely availed" herself of the forum state. *Northern Aircraft v Reed* at 42. Purposeful

availment of a forum state's market occurs when a manufacturer places its items into the forum state through a distributor. *Pasquele v Genovese* 136 Vt 417 (1978).

In *Pasquele,* defendant Volkswagen's deliberate distribution of cars to Vermont retailers through a New Jersey distributor was held to meet the minimum contacts standard required for jurisdiction. The court found that sufficient participation in the Vermont market occurred because of the "chain of manufacture and distribution set up for the purpose and through eventual sale of the vehicle in question in Vermont." *Pasquele v Genovese* at 421.

The reasoning of *Pasquele* fits with the "stream of commerce" theory which subjects manufacturers to personal jurisdiction wherever its products are sold, whether sold directly or indirectly. *World Wide Volkswagen v Woodson,* 444 U.S. 286 (1980). This theory emphasizes the notion that delivery by a manufacturer of a product into the stream of commerce provides fair warning that the manufacturer can be subjected to suit wherever the product is distributed. *Burger King Corp v Rudzewicz,* 105 S.Ct. 2174, 471 U.S. 462 (1985).

A situation similar to the case at bar was addressed in *Charles Gendler & Co. v Telecom Equipment Corp.,* 508 A.2d 1127, 102 N.J. 460 (1986). In *Gendler,* Nippon, a Japanese corporation, contested the ability of New Jersey to exercise legal jurisdiction, claiming that there was insufficient contract between Nippon and New Jersey to establish the requisite jurisdiction. Nippon sold the product in question to an American subsidiary, which then sold Nippon's product to a New York corporation. The

New York corporation subsequently sold the product to a New Jersey corporation.

Gendler stands for the proposition that the stream of commerce theory can be used to establish jurisdiction over a foreign company. According to *Gendler*, "a manufacturer that knows its products are distributed through a nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it will be subject to the jurisdiction of every state". *Id.* at 1138. For a manufacturer who chooses nationwide distribution, "the sale of its product in a distant state is not an isolated event", and "it is fair to subject them to jurisdiction." *Id.* at 1136. *Gendler* emphasizes that a manufacturer who places its products into the stream of commerce "derives both legal and economic benefits from the states in which its products are sold", and is proof of a manufacturer's "purposeful penetration" of the market. *Id.* at 1136. Moreover, as a matter of policy it would be unfair to allow manufacturers to escape responsibility for their actions because of the use of intermediaries to sell their products. *Id.* at 1137. On the other hand, *Gendler* acknowledges that "a manufacturer that prohibits the distribution of its products in a particular state would not reasonably expect its products to be sold in that state", and thus would not be subject to jurisdiction in that state. *Id.* at 1138.

In this case, A.J. Industries placed their product into the national stream of commerce by selling it to three nationwide distributors: Western Auto, Montgomery Ward, and Sears Roebuck. There is no evidence before the court that A.J. took any action to restrict the sale of their

product in specific states; conversely, the Chatfield deposition supports the conclusion that A.J.'s predecessor sought to sell the Wizard "wherever they could find a market." A.J. has presented no deposition or affidavit evidence to support its position that sales of the Wizard were contractually restricted to the South and Southwest. Based on the Chatfield deposition and Western's status as a nationwide retailer, the court rules that Western has met its burden under *Roman Catholic Diocese* of making a prima facie showing of jurisdiction.

A.J.'s argument that they were not given "fair warning" within the meaning of *Burger King* that selling the Wizard to a nationwide distributor could result in being haled into a Vermont court is unpersuasive. As the *Gendler* Court stated, "as applied to a manufacturer, the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state," (citations omitted). *Id.* at 1137. As it was foreseeable that A.J. would derive legal and economic benefits from the sale of the Wizard in every state, A.J. could reasonably anticipate litigation concerning the Wizard in every state, including Vermont.

As a prima facie showing of minimum contacts have been established, the court next considers the second prong of the two-part test. Assertion of personal jurisdiction must not offend "traditoinal notions of fair play and substantial justice". *Northern Aircraft v Reed* at 41, citing *International Shoe v Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, ___, (1945). In order to defeat jurisdiction, defendant "must present a compelling case that the presence of

some other considerations would render jurisdiction unreasonable," *Burger King Corp. v Rudzewicz* at 2185. Factors to be considered in this decision are: "the burden on the defendant, the interests on the forum state, the plaintiff's interest in obtaining relief", as well as interstate judicial economy interests. *Northern Aircraft v Reed* at 42, citing *World Wide Volkswagen Corp v Woodson* at 292.

Although defendant's status as an out-of-state corporation may make it inconvenient for A.J. to litigate in Vermont, it is recognized that a state such as Vermont has a compelling interest in being able to provide a forum for an injured resident against an out-of-state manufacturer. *See Gendler,* 508 A.2d at 1139. Vermont also represents the most efficient forum for obtaining relief. The injury occurred here, and the plaintiffs and witnesses to the alleged accident are to be found here. The extent of the plaintiff's pecuniary loss is best determined in the state where they reside.

Finally, litigating the action within a single forum presents the most efficient way for resolving this case. It would better serve the interests of interstate judicial economy and convenience if the entire matter were litigated in Vermont. Viewed in this light, the court finds that the remaining *Northern Aircraft* factors weigh in favor of Vermont jurisdiction and that "fair play and substantial justice" would not be offended.

ORDER

Defendant A.J.'s motion to dismiss for lack of personal jurisdiction is DENIED.

Dated at Montpelier, Vermont, this 10th day of September, 1992.

/s/ Stephen B. Martin
Hon. Stephen B. Martin
Superior Court Judge

ENTRY ORDER

SUPREME COURT DOCKET NO. 92-505

OCTOBER TERM, 1992

Deane and Raylene Hedges v. Western Auto Supply Co., Inc., Petrolane Gas Service, Inc., June S. Warren, and Armstrong Products Co. v. Western Auto Supply Co., Inc. v. A.J. Industries, Inc.	APPEALED FROM: Washington Superior Court DOCKET NOS. S221-89 WnC S473-91 WnC (Filed Oct. 28, 1992)

In the above entitled cause the Clerk will enter:

Defendant's motion for permission to appeal, which was timely filed with the superior court, see V.R.C.P. 6(a) (when prescribed period is less than 11 days, intermediate weekends and holidays are excluded from computation), is granted.

BY THE COURT:

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

[ ] Publish

[ ] Do Not Publish

/s/ John A. Dooley
John A. Dooley,
Associate Justice

/s/ James L. Morse
James L. Morse,
Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson,
Associate Justice

Hold for memo until: _____

STATE OF VERMONT

[ ] DISTRICT COURT OF VERMONT

[x] SUPERIOR COURT OF VERMONT

Unit No.	Circuit County	Docket Number
	WASHINGTON	S-211-89 & S-473-91 WnC

DEANE HEDGES, et al
WESTERN AUTO SUPPLY CO., INC.

V

WESTERN AUTO SUPPLY CO., INC.
A.J. INDUSTRIES, INC.

ENTRY REGARDING MOTION

(Filed Oct. 5, 1992)

Title of Motion: MO. FOR PERMISSION TO APPEAL

Date Motion Filed: 9/25/92

Party Filing Motion: [ ] Plaintiff/State _____

[x] Defendant A.J. Industries, Inc.

[ ] Other _____

Date Response Filed: _____

("NONE" If None Filed)

Compliance by _____

____ Granted

__X__ Denied

____ Scheduled for hearing on: _____ (Date) at _____ (Time);

Time Alloted _____

____ Other

/s/ Stephen B. Martin
Presiding Judge

_____
Assistant Judge

_____
Assistant Judge

10/2/92
Date

Date copies sent to:

Plaintiff/State Patrick Biggam, Esq.

Defense Douglas Pierson, Esq.

Other Richard Steinberg, Esq.

Peter Cullen, Esq.

James Spink, Esq.

Clerk's Initials ssh

STATE OF VERMONT
WASHINGTON COUNTY, SS.

DEANE HEDGES and RAYLENE HEDGES Plaintiffs v. WESTERN AUTO SUPPLY CO., INC., Defendant/Cross-Claim Plaintiff and Third-Party Plaintiff v. ARMSTRONG PRODUCTS COMPANY, a Division of A.J. Industries, Inc., a Delaware corporation, jointly and severally, Cross-Claim Defendant and A.J. INDUSTRIES, INC., a Delaware corporation, as survivor of Armstrong Products Corporation, Third-Party Defendant	)	WASHINGTON SUPERIOR COURT Docket No. S221-89 WnC

AFFIDAVIT OF JOSEPH H. BREUER

NOW COMES Joseph H. Breuer, being duly deposed and sworn, states as follows:

1. The information contained in this affidavit is based upon my own personal knowledge.

2. I was employed by A.J. Industries, Inc. ("A.J. Industries") from 1964 to 1984.

3. From 1971 to August 1, 1984 I served as Treasurer of A.J. Industries.

4. A.J. Industries was, during the time of my employment, a Delaware Corporation with its principal place of business in California.

5. A.J. Industries did not manufacture the Wizard Space Heater, Model No. ARP7002A76 that the Plaintiffs, in their Complaint, have alleged was defective and caused their injuries.

6. A.J. Industries has never been registered or licensed to do business in the State of Vermont, nor has it, to the best of my knowledge, ever conducted business in the State of Vermont.

Subscribed and sworn to under the pains and penalties of perjury this 31st day of July, 1991.

/s/ Joseph H. Breuer
Joseph H. Breuer

STATE OF CALIFORNIA)
) ss.
LOS ANGELES COUNTY,)

At the City of Pasadena, in said County this 31st day of July, 1991, personally appeared JOSEPH H. BREUER and he acknowledged this instrument subscribed and sworn to by him to be his free act and deed.

/s/ Linda M. Schube
Notary Public

[SEAL]

OFFICIAL SEAL
LINDA M. SCHUBE
Notary Public California
LOS ANGELES COUNTY
My Commission Expires
August 6, 1994

STATE OF VERMONT
WASHINGTON COUNTY, SS.

DEANE HEDGES and RAYLENE HEDGES Plaintiffs v. WESTERN AUTO SUPPLY CO., INC., Defendant/Cross-Claim Plaintiff and Third-Party Plaintiff v. ARMSTRONG PRODUCTS COMPANY, a Division of A.J. Industries, Inc., a Delaware corporation, jointly and severally, Cross-Claim Defendant and A.J. INDUSTRIES, INC., a Delaware corporation, as survivor of Armstrong Products Corporation, Third-Party Defendant	)	WASHINGTON SUPERIOR COURT Docket No. S221-89 WnC

AFFIDAVIT OF GREGORY CATRAMBONE

NOW COMES Gregory Catrambone, being duly deposed and sworn, states as follows:

1. The information contained in this affidavit is based upon my own personal knowledge.

2. I was Chief Financial Officer of A.J. Industries, Inc. ("A.J. Industries") from August 1, 1984 to June 30, 1990.

3. A.J. Industries is a Delaware Corporation with its principal place of business in California.

4. A.J. Industries did not manufacture the Wizard Space Heater, Nodel [sic] No. ARP7002A76 that the Plaintiffs, in their Complaint, have alleged was defective and caused their injuries.

5. A. J. Industries, to the best of my knowledge, has never been registered or licensed to do business in the State of Vermont, nor has it to the best of my knowledge ever conducted business in the State of Vermont.

Subscribed and sworn to under the pains and penalties of perjury this 1st day of August, 1991.

/s/ Gregory Catrambone
GREGORY CATRAMBONE

STATE OF CALIFORNIA)
) ss.
LOS ANGELES COUNTRY [sic],)

At the City of Rosemead, in said County this 1st day of August, 1991, personally appeared JOHN HAAKE and he acknowledged this instrument subscribed and sworn to by him to be his free act and deed.

/s/ Linda L. Gavin
Notary Public

[SEAL]

OFFICIAL SEAL
LINDA L. GAVIN
NOTARY PUBLIC – CALIFORNIA
LOS ANGELES COUNTY
My Comm., expires MAY 6, 1994

STATE OF VERMONT
WASHINGTON COUNTY, SS.

DEANE HEDGES and RAYLENE HEDGES, Plaintiffs v. WESTERN AUTO SUPPLY CO., INC., Defendant/Cross-Claim Plaintiff and Third-Party Plaintiff v. ARMSTRONG PRODUCTS COMPANY, a Division of A.J. INDUSTRIES, INC., a Delaware corporation, jointly and serverally, Cross-Claim Defendant and A.J. INDUSTRIES, INC., a Delaware corporation, as survivor of Armstrong Products Corporation, Third-Party Defendant	)	WASHINGTON SUPERIOR COURT Docket No. S221-89 WnC

AFFIDAVIT OF JOHN HAAKE

NOW COMES, John Haake, being duly deposed and sworn, states as follows:

1. The information contained in this affidavit is based upon my own personal knowledge.

2. I am now and at all times since June 30, 1990 have been Chief Financial Officer of A.J. Industries, Inc. ("A.J. Industries").

3. A.J. Industries is a Delaware Corporation with its principal place of business in California.

4. A.J. Industries did not manufacture the Wizard Space Heater, Model No. ARP 7002A76 that the Plaintiffs, in their Complaint, have alleged was defective and caused their injuries.

5. A.J. Industries, to the best of my knowledge, has never been registered or licensed to do business in the State of Vermont, nor has it to the best of my knowledge ever conducted business in the State of Vermont.

Subscribed and sworn to under the pains and penalties of perjury this 1st day of August, 1991.

/s/ John Haake
JOHN HAAKE

STATE OF CALIFORNIA)
) ss.
LOS ANGELES COUNTRY,)

At the City of Rosemead, in said County this 1st day of August, 1991, personally appeared JOHN HAAKE and he acknowledged this instrument subscribed and sworn to by him to be his free act and deed.

/s/ Linda L. Gavin
Notary Public

[SEAL]

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be

reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 855. Doing business as appointment of process agent

If the contact with the state or the activity in the state of a foreign corporation, or the contact or activity imputable to it, is sufficient to support a Vermont personal judgment against it the contact or activity shall be deemed to be doing business in Vermont by that foreign corporation and shall be equivalent to the appointment by it of the secretary of the state of Vermont and his successors to be its true and lawful attorney upon whom may be served all lawful process in any action or proceedings against it arising or growing out of that contact or activity, and also shall be deemed to be its agreement that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served on the foreign corporation at its principal place of business in the state or country where it is incorporated according to the law of the state or country. – Amended 1967, No. 353 (Adj. Sess.), § 5, eff. July 1, 1968; 1971, No. 185 (Adj. Sess.), § 43, eff. March 29, 1972.

No. 93-1567

Supreme Court, U.S.
FILED
MAY - 6 1994

In The

Supreme Court of the United States

October Term, 1993

A.J. INDUSTRIES, INC.,

Petitioner,

vs.

DEANE and RAYLENE HEDGES and WESTERN AUTO SUPPLY CO., INC.,

Respondents.

On Petition for Writ of Certiorari to the Vermont Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENT WESTERN AUTO SUPPLY CO., INC.

GREGORY SCOTT MERTZ
Counsel of Record
PHYLLIS G. SEVERANCE
THOMAS E. McCORMICK
McCORMICK, FITZPATRICK & MERTZ, P.C.
Attorneys for Respondent Western Auto Supply Co., Inc.
P.O. Box 638
40 George Street
Burlington, Vermont 05402
(802) 863-3494

QUESTION PRESENTED

1. Whether personal jurisdiction over the non-resident manufacturer of an allegedly defective product is proper where the manufacturer has directly employed a national distribution network to market its products in every state, including the forum state.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	2
I. Because the Vermont Supreme Court followed the appropriate legal principles in finding personal jurisdiction over Petitioner, there is no reason for this Court to grant certiorari.	2
A. Armstrong Directly Created, Controlled and Employed the Distribution Network for Its Products.	5
B. Armstrong Advertised Its Products and Solicited Business in the Forum State.	7
C. Traditional Notions of Fair Play and Substantial Justice Warrant the Imposition of Personal Jurisdiction.	8
Conclusion	11

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Abaun v. General Electric Co., 735 F. Supp. 1479 (D. Guam 1990) 11

Andrews University v. Robert Bell Industries, Ltd., 685 F. Supp. 1015 (W.D. Mich. 1988) 6, 8

Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987) 2, 4, 5, 7, 8, 9, 10, 11

Benitez-Allende v. Alcan Aluminio Do. Brasil, S.A., 857 F.2d 26 (1st Cir. 1988) 9

Boit v. Gar-Tech Products, Inc., 967 F.2d 671 (1st Cir. 1992) 6

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) ... 3

Charles Gendler & Co. v. Telecom Equipment Co., 508 A.2d 1127 (N.J. 1986) 5, 7, 9

Cox v. Hozelock, Ltd., 411 S.E. 2d 640 (N.C. App. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 78 (1992) 6, 10

Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834 (8th Cir. 1986) 7, 8

Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990) 5, 6, 9

Contents

	Page
Hall v. Zambelli, 669 F. Supp. 753 (SD. W. Va. 1987)	5, 7, 10
Hanson v. Denckla, 357 U.S. 235 (1958)	3
Humble v. Toyota Motor Co., 727 F.2d 709 (8th Cir. 1984)	4, 5
In re San Juan Dupont Plaza Hotel Fire Litigation, 742 F. Supp. 717 (D. Puerto Rico 1990)	5
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	3
Larose v. Sponco Mfg., Inc., 712 F. Supp. 455 (D. N.J. 1989)	6
Madara v. Hall, 916 F.2d 1510 (7th Cir. 1990)	6, 8
McGee v. International Life Insurance Co., 355 U.S. 220 (1957)	3
Murante v. Pedro Land, Inc., 761 F. Supp. 786 (S.D. Fla. 1991)	8
Smith v. Dainichi Kinzoku Kogyo Ltd., 680 F. Supp. 847 (W.D. Tex. 1988)	6, 8
Tobin v. Astra Pharmaceutical Products, Inc., 993 F.2d 528 (6th Cir. 1993)	7, 10
Vermeulen v. Renault U.S.A., Inc., 975 F.2d 746 (11th Cir. 1992)	7, 8

Contents

	Page
Violet v. Picillo, 613 F. Supp. 1563 (D.C. R.I. 1985)	9
World-Wide Volkswagen Corp. v. Woodson, 445 U.S. 286 (1980)	3, 4, 8

STATEMENT OF THE CASE

In 1967, Petitioner's predecessor-in-interest, Armstrong Products Corporation (hereinafter "Armstrong"), a West Virginia corporation, manufactured "Wizard" space heaters. In 1988, in Berlin, Vermont, Respondent Deane Hedges was severely injured when an allegedly defective Wizard heater tipped over, causing an explosion. The heater had been sold by Armstrong to Respondent Western Auto Supply Co. (hereinafter "Western"), a nationwide distributor of home appliances and hardware with retail outlets in every state, including Vermont.[1] The record does not disclose the particular means by which Hedges came into possession of it.

Armstrong and Western had a long-standing contractual relationship in which Western purchased considerable numbers of space heaters and ironing machines, both under Armstrong's "Wizard" label, for national distribution and sale. Armstrong also distributed its various products through other nationwide retailers such as Sears, Roebuck & Company and Montgomery Ward. There were no geographic restrictions on the distribution of any of these products.

Standing in Armstrong's shoes, Petitioner challenged the Vermont court's assertion of personal jurisdiction over it in the products liability action subsequently brought by Hedges. Ultimately, the Vermont Supreme Court ruled that it was proper to exercise personal jurisdiction over Petitioner in Vermont. By directly employing a nationwide distribution network that included Vermont to market its products, the court reasoned, Armstrong had purposely availed itself of Vermont's market, and

---

1. Western is a Delaware Corporation, incorporated as a wholly-owned subsidiary of Beneficial Corporation in 1961. In 1985, it was acquired by Wesray Corporation. In 1988 it was acquired by Sears, Roebuck & Company, a New York Corporation, and has been operated as a wholly-owned subsidiary of Sears since that time.

reasonably should have foreseen the possibility of being haled into court there to defend its products. Because the relative burdens on the parties and the interests of the forums decidedly favored Vermont, furthermore, traditional notions of fair play and substantial justice were not offended by the imposition of personal jurisdiction against Petitioner in Vermont. Correctly applying the principles enunciated most recently by this Court in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), the Court held that Petitioner was subject to suit in Vermont. This conclusion is now challenged by Petitioner in its Petition for Writ of Certiorari to this Court.

REASONS FOR DENYING THE WRIT

I.

BECAUSE THE VERMONT SUPREME COURT FOLLOWED THE APPROPRIATE LEGAL PRINCIPLES IN FINDING PERSONAL JURISDICTION OVER PETITIONER, THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI.

Petitioner asserts that this Court should grant certiorari in order to correct the Vermont Supreme Court's failure to follow the due process standard for establishing personal jurisdiction set forth in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). The fact that the Vermont court found personal jurisdiction to exist over Petitioner, however, does not mean that it rejected *Asahi*. To the contrary, in asserting jurisdiction the court correctly applied the legal principles laid out by this Court in *Asahi*. There is no reason, therefore, for this Court to grant certiorari.

Asahi is the most recent in a long line of cases that have examined the boundaries of personal jurisdiction under Constitutional due process standards. Prior decisions of this Court

have established that a court seeking to impose personal jurisdiction, consistent with due process, over a non-resident defendant must satisfy a two-prong test: first, the defendant must be shown to have purposefully established "minimum contacts" in the forum state, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), and second, the imposition of jurisdiction must not be accomplished under circumstances that would offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

To establish the requisite "minimum contacts," a non-resident defendant must be shown to have directed some act towards the forum state by which it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475, *quoting Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The contacts must not occur solely because of the unilateral act of an unrelated third party, as by a consumer bringing a product into the forum state after the defendant has, placed it into the "stream of commerce" elsewhere, *World-Wide Volkswagen Corp. v. Woodson*, 445 U.S. 286, 297-298 (1980), but rather must "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475, *quoting McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957) (emphasis in original).

In *Asahi*, the meaning of minimum contacts was explored further. A plurality of justices found that in order to establish the requisite "substantial connection" with the forum state, a non-resident defendant must be shown to have done more than merely place its product into the stream of commerce. 480 U.S. at 112. There must be additional conduct as well by which the defendant's intent or purpose to serve the forum state's market is established, such as advertising or soliciting business there, designing its products for use there, or creating a distribution system to market its products there. *Id.*

No such additional conduct was found in *Asahi*.[2] The non-resident defendant there, an alien corporation, manufactured a component part which was both produced and distributed outside of the forum state, and only made it to the forum state as a result of the distribution network employed by the ultimate manufacturer, also an alien corporation. The component manufacturer did not otherwise solicit business in the forum state or specifically direct any activities there. Under those circumstances, although it may have been foreseeable that the component manufacturer's products ultimately may have been swept into the forum state, its conduct and connection with the forum state were not such that it reasonably should have anticipated being haled into court there. *World-Wide Volkswagen*, 444 U.S. at 297; *see also Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984), cited with approval in *Asahi*, 480 U.S. at 111. Thus, the imposition of personal jurisdiction was deemed improper.

Such is not the case in the current action. Here, Armstrong stands in a dramatically different factual position than did the alien defendant in *Asahi*. In finding jurisdiction over it, the Vermont Supreme Court did not ignore *Asahi*; it correctly interpreted its legal principles and appropriately distinguished its facts. There is no reason, therefore, for this Court to grant certiorari.

---

2. *Asahi* was a plurality decision. The Court unanimously held that traditional notions of fair play and substantial justice precluded the exercise of personal jurisdiction over the non-resident defendant regardless of whether sufficient minimum contacts existed with the forum state or not. The Court was divided, however, both as to the appropriate legal standard for measuring minimum contacts and as to whether factually the standard had been met. Of those justices that considered additional conduct to be necessary in order to support a finding of minimum contacts, a majority found none. 480 U.S. at 112-113, 122.

A. Armstrong Directly Created, Controlled and Employed the Distribution Network for Its Products.

One of the factors deemed significant by this Court in determining that there were insufficient minimum contacts to justify the imposition of personal jurisdiction over the non-resident defendant in *Asahi* was the fact that it did not "create, control, or employ the distribution system" that brought its products into the forum state. 480 U.S. at 112. In contrast, in the current case, the non-resident defendant purposefully created and directly employed the distribution system that brought its products into Vermont.

As a component manufacturer, the non-resident defendant in *Asahi* was completely removed from the distribution network that controlled when, where, how and to whom the final product was marketed. 480 U.S. at 112. Unlike the manufacturer of a final product, a component manufacturer cannot realistically exercise control over the final product's ultimate distribution, and therefore cannot eliminate the possibility of being haled into court in an undesirable forum. *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375 (8th Cir. 1990) (no jurisdiction over alien component manufacturer where, for all it knew, end product manufacturer could have installed component at any number of locations, either in the United States or abroad). This fact alone justifies the imposition of a heavier burden upon a court seeking to assert personal jurisdiction against a component manufacturer, as was the case in *Asahi*, than is necessary against the manufacturer of a final product, as is the case here. *See Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 742 F. Supp. 717 (D. Puerto Rico 1990); *Hall v. Zambelli*, 669 F. Supp. 753, 757 (S.D. W. Va. 1987); *Charles Gendler & Co. v. Telecom Equipment Corp.*, 508 A.2d 1127 (N.J. 1986).

But unlike the non-resident defendant in *Asahi*, who did not

directly create, control or even use the distribution network that ultimately carried its product to California, in the present case Armstrong itself had the power to directly control the distribution of its products. *Cf. Boit v. Gar-Tech Products, Inc.*, 967 F.2d 671 (1st Cir. 1992) (no jurisdiction over non-resident defendant where evidence failed to establish whether it directly controlled the distribution network that resulted in the marketing of its product in the forum state); *Madara v. Hall*, 916 F.2d 1510 (7th Cir. 1990) (no jurisdiction over non-resident defendant magazine interviewee who had no control over where magazine containing allegedly libelous statement was distributed); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990). Had Armstrong wanted to avoid the possibility of being haled into court to defend its products in a particular forum, it could have restricted distribution accordingly, by choosing local or regional distributors to market its products in select areas only, rather than using nationally known retailers whose reach extended into every state. *See, e.g., Larose v. Sponco Mfg., Inc.*, 712 F. Supp. 455 (D. N.J. 1989) (no jurisdiction over non-resident local distributor with a constrained foreseeable market); *Andrews University v. Robert Bell Industries, Ltd.*, 685 F. Supp. 1015, 1023 (W.D. Mich. 1988) (no jurisdiction over alien manufacturer who had no marketing or distribution system in the United States); *Smith v. Dainichi Kinzoku Kogyo Ltd.*, 680 F. Supp. 847 (W.D. Tex. 1988) (no jurisdiction over non-resident manufacturer who distributed its product to retailer whose territory did not encompass the forum state).

Armstrong took no such steps to restrict the distribution or sale of its products. *See* Entry Order, Vermont Superior Court, January 13, 1994, Petitioner's Appendix at 2. To the contrary, it purposely directed its products into every state served by its distributors, including Vermont. That it did so by employing independent national distributors — distributors that it in fact chose *because* of their nationwide reach and recognition — does not make its intent to serve every state's market any less apparent,

or its decision to do so any less deliberate. *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993); *Vermeulen v. Renault U.S.A., Inc.*, 975 F.2d 746 (11th Cir. 1992); *Hall v. Zambelli*, 669 F. Supp. 753, 757 (S.D. W.Va. 1987); *Cox v. Hozelock, Ltd.*, 411 S.E. 2d 640, 643 (N.C. App. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 78 (1992); *Charles Gendler & Co. v. Telecom Equipment Co.*, 508 A.2d 1127, 1136 (N.J. 1986). The stream of commerce that carried Armstrong's products into Vermont was neither the result of a consumer's unilateral act, nor random, fortuitous happenstance. It was a journey that Armstrong itself deliberately mapped out for its products, one that it regularly used and from which it profited, and one for which it properly should be made to bear the risks.

B. Armstrong Advertised Its Products and Solicited Business in the Forum State.

The plurality in *Asahi* found that a non-resident defendant who advertises or otherwise solicits business in the forum state demonstrates thereby its intent to serve the forum state's market, such that the imposition of personal jurisdiction becomes proper. 480 U.S. at 112. Unlike the defendant in *Asahi*, the non-resident defendant here both advertised and solicited business in the forum state. Washington County (Vermont) Superior Court, Ruling on Motion to Dismiss for Lack of Personal Jurisdiction, September 10, 1992, Petitioner's Appendix at 10. Once again, therefore, the Vermont Supreme Court correctly applied the legal standard enunciated in *Asahi* to different facts, and thereby reached the only appropriate result.

Although Armstrong's marketing efforts in Vermont may have focused on other Wizard product lines in addition to its space heaters, the name recognition and positive consumer response it hoped to establish thereby would have extended to all of its products, including its heaters. *Vermeulen v. Renault U.S.A., Inc.*, 975 F.2d 746 (11th Cir. 1992); *Decker Coal Co. v. Commonwealth*

Edison Co., 805 F. 2d 834, 840 (9th Cir. 1986) ; *Murante v. Pedro Land, Inc.*, 761 F. Supp. 786 (S.D. Fla. 1991). In any event, whether by way of offering to supply the forum state's residents with ironing machines or space heaters, the consequence of such conduct, purposefully directed as it was towards the forum state's market, was that Armstrong reasonably should have anticipated being haled into court there. *Cf. Andrews University v. Robert Bell Industries, Ltd.*, 685 F. Supp. 1015, 1023 (W.D. Mich. 1988) (no jurisdiction over alien boiler manufacturer whose contacts with the forum involved only three prior sales of similar products, all of which were unsolicited; situation would have been different if it had had "a marketing or distribution system or in some other way promoted its products" in the forum). This is the kind of foreseeability that is critical to the proper exercise of due process. It is *not* the ability to predict that a particular item will find its way into the forum state merely because of some third party's fortuitous act, but rather that the defendant's own purposeful acts will have some effect in the forum state. *Madara v. Hall*, 916 F.2d 1510, 1517 (7th Cir. 1990) (citing *Asahi*); *see also Vermeulen v. Renault U.S.A., Inc.*, 975 F.2d 746, 760 n. 20 (11th Cir. 1992); *Smith v. Dainichi Kinzoku Kogyo Ltd.*, 680 F. Supp. 847 (W.D. Tex. 1988). This is the foreseeability that provides the constitutional touchstone of personal jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 297. It was lacking in *Asahi*, but it is present here.

C. Traditional Notions of Fair Play and Substantial Justice Warrant the Imposition of Personal Jurisdiction.

Although this Court was divided in *Asahi* as to whether sufficient minimum contacts existed with the forum state to justify the imposition of personal jurisdiction, it unanimously held that jurisdiction could not be asserted in any event because to do so would offend "traditional notions of fair play and substantial justice." 480 U.S. at 111-116. Balancing the relevant factors in the present case compels an entirely different result.

In *Asahi*, this Court found that the relative burdens on the parties and the relative interests of the forums mandated against a finding of personal jurisdiction in California. The defendant there was not only a non-resident, but also was an alien. This Court noted the "unique burden placed upon one who must defend oneself in a foreign legal system," and accorded significant weight to this factor. 480 U.S. at 114. Balanced against the minimal interest that the forum state had retained in the lawsuit once the primary litigants had settled out, to have exercised personal jurisdiction would have been unreasonable and unfair. 480 U.S. at 116.

Exactly the opposite result is dictated here. Armstrong is not an alien defendant, and therefore is not being compelled to litigate a foreign dispute in an unfamiliar judicial system. *Cf. Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 376 (8th Cir. 1990). To the contrary, it is being called upon to defend its products in a forum in which it voluntarily chose to market them and with which its familiarity is not questioned. *Benitez-Allende v. Alcan Aluminio Do. Brasil, S.A.*, 857 F.2d 26 (1st Cir. 1988). Under these circumstances, to impose jurisdiction against it in Vermont would not be unduly burdensome.

Vermont has a compelling interest in being able to provide a forum for an injured resident against the out-of-state manufacturer of a defective product. *Charles Gendler & Co. v. Telecom Equipment Corp.*, 508 A.2d 1127, 1139 (N.J. 1986). Judicial economy is promoted by having all persons in the chain of distribution appear in one action to defend against product liability claims, a consideration that, again, favors Vermont as the most appropriate forum. *See Violet v. Picillo*, 613 F. Supp. 1563, 1579 (D.C. R.I. 1985). Given that the accident occurred there, the plaintiffs reside there, and the witnesses are located there, Vermont also represents the most efficient forum for obtaining relief. All of these considerations mandate *in favor of* the exercise of personal jurisdiction over Armstrong in Vermont, not against it.

Indeed, if personal jurisdiction cannot be asserted against Armstrong in Vermont under the circumstances of this case, then presumably the only state where jurisdiction against it would lie would be in West Virginia, its home state. Certainly, considering such factors as judicial economy, the convenience of the parties and the forum's interest in the litigation, traditional notions of fair play and substantial justice would disfavor any other state. Such a result would raise unnecessary barriers for products liability plaintiffs, both financial and otherwise. *Cox v. Hozelock, Ltd.*, 411 S.E. 2d 640, 643 (N.C. App. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 78 (1992). It would be to close one's eyes to the benefits that Armstrong reaped by deliberately employing a national distribution network to market its wares that encompassed rather than excluded Vermont. *Hall v. Zambelli*, 669 F. Supp. 753, 757 (S.D. W. Va. 1987). Such a result would undermine traditional notions of fair play and substantial justice, not enhance them.

Traditional notions of fair play and substantial justice compel the imposition of jurisdiction against Armstrong in Vermont, therefore. This is not one of those "rare cases" in which such concerns defeat the reasonableness of jurisdiction. *Asahi*, 480 U.S. at 116 (Brennan, J., concurring in part and concurring in the judgment). Armstrong has purposefully availed itself of Vermont's market and consequently is answerable for its defective products there. Personal jurisdiction exists against it in Vermont.

Far from ignoring the due process standards for imposing personal jurisdiction on a non-resident defendant laid out by this Court in *Asahi*, therefore, the Vermont Supreme Court in fact properly applied them and appropriately found jurisdiction to exist. That other courts as well have found reason to distinguish *Asahi* signifies no more than that in each case, the decision whether to impose personal jurisdiction necessarily must rest on the particular facts establishing the nature and extent of the non-resident defendant's connection to the forum. *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993);

Abaun v. General Electric Co., 735 F. Supp. 1479 (D. Guam 1990). *Asahi* has not been ignored; it has been assimilated into the body of due process jurisprudence against which each non-resident defendant's conduct must be measured. But different facts compel different conclusions, even though the same legal standards are applied. In the present case, no other conclusion would have been justified, given the legal principles enunciated in *Asahi*. There is no reason, therefore, for this Court's review. The petition for certiorari should be denied.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.[3]

Respectfully submitted,

GREGORY SCOTT MERTZ
Counsel of Record
PHYLLIS G. SEVERANCE
THOMAS E. McCORMICK
McCORMICK, FITZPATRICK
& MERTZ, P.C.
Attorneys for Respondent
Western Auto Supply Co., Inc.
P.O. Box 638
40 George Street
Burlington, Vermont 05402
(802) 863-3494

---

3. Western has been authorized to state that Respondents Deane and Raylene Hedges join in its opposition to the Petition for a Writ of Certiorari.